No. 03-617

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In The
# Supreme Court of the United States

SCOLLON PRODUCTIONS, INC.,
*Petitioner,*

v.

LISA OCHELTREE,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Fourth Circuit Court of Appeals was correct in upholding a jury's decision that Respondent was harassed "because of her sex."

2. Whether the Fourth Circuit Court of Appeals was correct in analyzing the "severe or pervasive" standard under the totality of the circumstances.

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## BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent, Lisa Ocheltree, presents this Brief in Opposition to the Petition for Writ of Certiorari by Scollon Productions, Inc.. Ocheltree respectfully requests that this Court deny Scollon's Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

The Fourth Circuit Court of Appeals, sitting *en banc*, affirmed a jury's finding that Lisa Ocheltree was sexually harassed while employed at Scollon Productions. The *en banc* panel reviewed the jury's findings in this case and correctly found that the evidence in this particular case supported the jury's verdict. Petitioner now wishes to take exception with the factual findings of the jury. However, this case merely presents the correct application of current law to a very fact-specific case by a jury and the Fourth Circuit Court of Appeals *en banc* panel.

Lisa Ocheltree worked for Scollon Productions for eighteen months. After being terminated from her employment for reasons irrelevant to this case, Ocheltree brought an action under Title VII for the sexual harassment she had to endure while employed at Scollon. At trial, the jury answered a detailed five page special interrogatory submitted by Petitioner over Ocheltree's objections. To impose liability, the special interrogatories required the jury to find that Ocheltree was discriminated against because of her sex and that

the discrimination was severe or pervasive to a reasonable person. The jury found for Ocheltree and awarded her $7,280 in compensatory damages and $400,000 in punitive damages.

The evidence showed that while employed as the only female in the production shop area, Ocheltree was subjected to numerous instances of harassment. The "incident" Petitioner mentions with the mannequin (the record does not reflect it was "featureless" as Petitioner claims) occurred as Ocheltree was arriving at work and had to pass the mannequin to get from the time clock to her work station. Once Ocheltree arrived and found the two men simulating sexual acts on the mannequin, the men went back to their workstations while almost everyone in the shop laughed at Ocheltree. As far as the allegation of Ocheltree looking at the body piercing book, she was never questioned specifically about this; but at trial she denied participating in any sexual misconduct, using any sexual language, or acting otherwise inappropriately.

Petitioner alleges the song and mannequin incident were the only conduct arguably directed towards her. Petitioner's statement is inaccurate and not supported by the record. First, there was not just one mannequin incident. There were many instances of sexual acts being performed on the mannequin. Testimony at trial indicated that almost every time Ocheltree would walk by, the men would do something sexual to the mannequin. Additionally, a picture of a male's genitals in the piercing book was shown to Ocheltree. She was also subjected to Hirsch's

disgusting conversation concerning young boys. The men in the shop laughed at Ocheltree's reaction on both of these occasions as well. Furthermore, Petitioner fails to account for the incident involving the man who told Ocheltree an off-color joke and was terminated by Scollon for a variety of reasons.

Additionally, the general workplace was full of general sexual talk and misconduct. Ocheltree was subjected to a daily barrage of language that included "motherfucker," "dickhead," "faggot," "pussy," and "blow job." Ocheltree was forced to hear stories about men's sexual exploits of their wives and girlfriends, including comments such as, "she swallowed, she gave good head, [or] I fucked her all night long." There was talk of two men being involved in a homosexual relationship and comments about one man having sex with a dog.

One man told the shop that his girlfriend "gave good head, that she likes to swallow, that she liked it from behind, [and] that she would do it anywhere with him." This same man further commented that his girlfriend could "suck a golf ball through a garden hose." A separate employee "would speak of [his wife] sucking his dick and swallowing and letting it run down the side of her face and stuff." Ocheltree's supervisor, Harold Hirsch, would talk of his desire to have sex with young boys and how he "enjoyed . . . licking young boys' dicks." Incredibly, Petitioner contends most of the offensive statements "could be broadcast on primetime television."

Petitioner further alleges "the testimony did not at all indicate that they laughed at her reaction." As the *en banc* court stated, there was "shoproom laughter that erupted at Ocheltree's expense," and Hirsch would frequently join in the laughter. There was testimony Ocheltree's co-workers laughed when the song was sung to her regarding her breath smelling like "cum," laughed concerning incidents with the mannequin, laughed at her embarrassment over the picture in the body-piercing book, and laughed when Hirsch was telling others about his sexual desires for young boys. This last comment was purposefully said in front of Ocheltree at her workstation. Petitioner's claim that Ocheltree's testimony did not indicate the men laughed at her reaction is not in accord with the record. In addition to the numerous events mentioned above, Ocheltree *specifically* testified at trial that the men "enjoyed looking at [her] and seeing [her] reaction."

Petitioner accuses Ocheltree of participating in some of the crude conduct. The facts show she never talked about anything of a sexual nature, she never joined in any of the sexual conversations which occurred in the shop, she never talked in the shop about her husband's penis, and she never brought any sexual-type photos to work and showed them to co-workers.

Petitioner raised the issue of warnings Ocheltree received at work and other incidents of no relevance. Whether Ocheltree was late to work or used the telephone too often is completely irrelevant to the issue of whether she suffered sexual harassment while employed at Scollon Productions.

While Petitioner alleges Ocheltree never complained to management, the record in this case is clear that she made numerous complaints to her immediate supervisor, Hirsch. Ocheltree also attempted to speak to the president and vice-president of the company on several different occasions. The evidence showed that Ocheltree repeatedly complained to the shop supervisor, who ignored her problems. Hirsch was more than just Ocheltree's supervisor; he was part of the harassment, and he participated in the sexual talk almost daily.

The president of the company, Bill Scollon, also ignored Ocheltree. Ocheltree tried to speak to Scollon on several occasions only to be told that he did not have time for her. Scollon would tell her to "go back to work" or "go see Mr. [Ellery] Locklear" (the company's vice-president). Scollon himself even acknowledged that one time when Ocheltree attempted to speak with him, he considered whatever she had to say to be "unimportant."

Locklear also ignored Ocheltree when she tried to voice a complaint. In fact, on one occasion, Ocheltree left a note for Locklear while he was on the telephone. Ocheltree placed the note directly in front of Locklear. The note said "Ellery, Need to talk to you, very important, Lisa." Locklear admitted he saw the note but chose to ignore it and never spoke to Ocheltree.

On other occasions, Ocheltree was stopped by her supervisor from complaining to the top management. Ocheltree testified Hirsch knew she was

going to complain to Locklear or Scollon about the harassment since Hirsch would not act. Hirsch would tell Ocheltree to get back to work and that he would relay the message to Scollon or Locklear, and they would come speak to her. Ocheltree lost track of the number of times she tried to complain to Locklear and was ordered by Hirsch to go back to work.

Additionally, Ocheltree attempted to complain at a "safety meeting" in hopes the minutes would be given to management. The testimony at trial indicated the amount of sexual misconduct and talk increased greatly after Ocheltree complained at the safety meeting. Ocheltree testified that she complained at the safety meeting because minutes were taken by a supervisor and she wanted her complaints documented on paper where they would be passed on to the president and vice-president of the company.

Petitioner next argues it had a written policy in force prohibiting sexual harassment. However, as the *en banc* panel noted, the purported policy amounted to little more than a section on "talking" and an "open door policy." The "open-door" policy was far more closed than the label suggests. Ocheltree was rebuffed on numerous occasions when she tried to speak to management. The few times Ocheltree was able to approach management, she was sent away or ignored by them. On one occasion, Ocheltree attempted to talk to Locklear on a separate issue only to be told she did not need to tell him anything, and if she did not like it there she "should go home and be a housewife."

Additionally, Scollon's policies did not require a supervisor to report incidents of sexual harassment to management. The shop supervisor not only failed to report the harassment and Ocheltree's complaints about the harassment, but he actively tried to prevent her from complaining to management. The work environment was so bad that Ocheltree often had to leave the work area and go to the restroom to escape the sexual harassment and regain her composure. Hircsh would wait for her to exit, however, so that she could not go to complain to management.

Scollon failed to provide reasonable avenues for employees to complain about harassment. Any channel they did provide for complaints was ineffective and inadequate and was not followed. Petitioner should not be allowed to rely upon a farce of a policy which was ignored even by supervisors and management.

Finally, Petitioner states Ocheltree knew if a complaint were made, "someone would be fired." The employee fired in June of 1994 was continuously breaking molds and had previously been warned for sexual misconduct towards other women as well. The gentleman who relayed Ocheltree's complaint to management was already on his way to complain to Scollon about this employee's extremely poor work performance. Scollon even admitted at trial the complaint also revolved around molds that the employee kept breaking.

Ocheltree complained to her supervisor, the vice-president of the company, and the president of the company per the "open-door" policy, and she was ignored. According to Scollon's trial testimony, on one occasion he ignored Ocheltree because he considered whatever she had to say "a smoke screen" - never affording her the opportunity to say anything.

Petitioner's recitation of the facts clearly fails to apply the fundamental principles that courts must "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh evidence." *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 150-151 (2000). Once the facts are reviewed as they were actually presented at trial, the Petition in this case fails to present evidence to support the granting of a Writ of Certiorari by this Court.

## REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

### I. NO SPLIT EXISTS AMONG THE CIRCUIT COURTS REGARDING ANY LEGAL ISSUE IN THIS CASE

Petitioner's desire to raise a conflict between the Circuit Courts of Appeals is premised on speculation and is wholly unsubstantiated. Petitioner asserts there is a split among the circuits, but nowhere in the Petition is this alleged split specifically defined. A conflict of circuits is not implicated in this fact-specific case. Instead, the Fourth Circuit, sitting *en banc*, upheld a jury's finding that Ocheltree was subjected to a

hostile working environment in violation of Title VII. The evidence presented at trial showed a working environment full of sexually crude speech and misconduct, much of which reflected a general hostility toward women. Many instances of conduct were directed specifically at Ocheltree "because of her sex."

In order to establish a claim under Title VII, Ocheltree had to prove that the offending conduct: (1) was unwelcome, (2) was because of her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Spicer v. Com. Of Va. Dept. of Corrections*, 66 F.3d 705 (4th Cir. 1995) (*en banc*).

Contrary to Petitioner's argument, the Fourth Circuit did not uphold the jury's finding of sexual harassment based on speech or conduct that was not clearly "because of sex." The *en banc* panel upheld the jury verdict because it found there was sufficient evidence to support the jury's determination that the speech or conduct was because of sex. The Fourth Circuit did not rely upon a disparate impact theory of non-harassing conduct. Rather, the panel held "[m]uch of the conduct, a jury could find, was particularly offensive to women and was intended to provoke Ocheltree's reaction as a woman." *Ocheltree v. Scollon Productions, Inc.*, 335 F. 3d 325, 332 (4th Cir. 2003) (*en banc*).

In *Oncale*, this Court offered three examples of ways in which an inference that harassment is "because of sex" could be drawn. These examples, while not

exhaustive, include (1) desire-based "explicit or implicit proposals of sexual activity;" (2) use of "sex-specific and derogatory terms" demonstrating a general hostility toward the presence of the harassee's sex in the workplace; and (3) "comparative evidence about how the harasser treated members of both sexes in a mixed-sex workplace." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80-81 (1998). This case falls squarely within the second prong.

As the *en banc* panel noted, "a jury could find that the men in the production shop 'harassed [Ocheltree] in such sex-specific and derogatory terms . . . as to make it clear that [they were] motivated by general hostility to the presence of [a] wom[a]n in the[ir] workplace.'" *Ocheltree v. Scollon Productions, Inc.*, 335 F. 3d 325, 333 (4th Cir. 2003) (*en banc*) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)). The Fourth Circuit went on to hold that "a reasonable jury could find that, taken together, the various mannequin incidents, the vulgar song and picture, and the graphic descriptions of sexual activity (especially oral sex) that consistently painted women in a sexually subservient and demeaning light were sufficiently severe or pervasive to alter the conditions of Ocheltree's employment and to create an abusive working environment." *Ocheltree v. Scollon Productions, Inc.*, 335 F. 3d 325, 333 (4th Cir. 2003) (*en banc*).

Petitioner cites several cases as being in conflict with the Fourth Circuit's opinion in this case. However, none of the cases cited by petitioner raises a conflict among the circuits. For example, *Galloway v. Gen. Motors Serv. Parts Operations*, 78 F. 3d 1164 (7th

Cir. 1996) simply held that under the facts of that case the use of the term "bitch" does not support an automatic inference that the language was motivated by sex. In *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 595 (5th Cir. 1995) the court merely held that based on the facts of that particular case, there was not conduct severe or pervasive enough to create an objectively hostile work environment. The circuit courts in those cases simply analyzed the specific facts and circumstances of each case under the law, just as the Fourth Circuit did in this case.

The few cases cited by Petitioner as allegedly being in conflict with the decision of the Fourth Circuit in this case neither reflect any departure from this Court's decisions regarding sexual harassment, nor do they point to any conflict among the circuits. The Fourth Circuit's opinion simply followed the law based on this Court's decisions in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and their brethren.

While Petitioner claims that there is a split among the circuits, it is clear from the case law that no such split exists. Any split in the circuits perceived by Petitioner is merely due to the fact-specific nature of sexual harassment cases and the need for courts to "look[] at all of the circumstances." *Harris* at 23. A careful reading of these cases makes it clear that there is no conflict between the decisions of the circuit courts.

## II. THIS COURT HAS ALREADY DEFINED THE "SEVERE OR PERVASIVE" STANDARD

There exists no reason for the Court to grant the Petition based upon this issue. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) this Court clearly established the standard for determining when conduct is sufficiently severe or pervasive to create an abusive working environment. This Court held that the inquiry involves an examination "of all of the circumstances," including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. Such determinations are to be made by the jury, as the jury did in this fact-specific case.

As this Court has noted, the real impact of "workplace behavior depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998). Despite Petitioner's argument, the culture and attitudes of a workplace do not excuse sexual harassment. "There is no assumption-of-risk defense to charges of workplace discrimination." *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999). Even if the conduct was occurring prior to Ocheltree's arrival, sexual harassment cannot be "grand-fathered in."

Other circuit courts have held that the entire working environment and all actions in it must be examined when analyzing a hostile work environment claim under Title VII. *See O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001) (holding courts "should avoid disaggregating a hostile work environment claim, dividing sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct"); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F. 3d 62 (2nd Cir. 2000) (holding that plaintiff need not be the target of racial comments made to other employees in order for them to support the plaintiff's discriminatory harassment claim); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 571 (2d Cir. 2000) (stating that the creation of a hostile work environment includes conduct when plaintiff is not present and not the target); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990) ("a play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but in the overall scenario" - finding of harassment based in part on sexual innuendo, sexual materials and sexual conduct in the workplace); *Wyerick v. Bayou Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989) (entering into a work environment heavily polluted with sexual abuse does not welcome abuse); *Jackson v. Quanex Corp.*, 191, F.3d 647, 660 (6th Cir 1999) (holding in case where the plaintiff experienced harassing conduct as well as overhearing racist slurs that "offensive comments need not be directed at a plaintiff in order to constitute conduct violating Title VII"); *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) (stating that prevailing culture cannot

excuse discriminatory conduct); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997) ("conduct [that] disproportionately affected female staff could support a determination that the harassment was based on sex"); *Turnball v Topeka State Hosp.*, 255 F. 3d 1238 (10th Cir. 2001) ("conduct that affects both sexes may constitute sexual harassment if it disproportionately affects female staff").

The trial judge in this case had the benefit of this Court's guidance when he charged the jury, just as the Fourth Circuit had this Court's guidance in reviewing the jury verdict. Petitioner claims that the environment, at worst, was "unpleasant." The record reflects Ocheltree was humiliated and embarrassed; there were times when she would turn red and have to leave her workplace. Ocheltree's situation is characteristic of the difficulties many women must face when entering a predominantly male workplace – women are often not welcomed and men's behavior and discussions toward and about women can and often do graphically convey that message.

This Court has clearly defined the "severe or pervasive" standards to be utilized by courts and juries. The Fourth Circuit properly reviewed the jury verdict applying the standards this Court has established for courts and juries to use when determining if conduct is sufficiently severe or pervasive.

## CONCLUSION

This Court should deny Scollon's Petition for Writ of Certiorari.

Respectfully submitted,

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